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7
8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

10
11 MARCIANO PLATA, et al.,

12 *Plaintiffs,*

13 v.

14 ARNOLD SCHWARZENEGGER, et al.,

15 *Defendants.*

Case No. C01-1351 TEH

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RECEIVER'S OPPOSITION TO
MOTION OF NON-PARTY PUBLIC
HEALTH SERVICES BUREAU TO SET
ASIDE CONTRACT AWARDED TO
MAXOR NATIONAL PHARMACY
SERVICES CORPORATION**

Date: January 22, 2007
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1 Receiver Robert Sillen ("Receiver") submits this memorandum of points and authorities
2 in support of his opposition to the motion brought by non-party Public Services Health Bureau
3 ("PHSB") to set aside the contract awarded to Maxor National Pharmacy Services Corporation
4 ("Maxor").

5 FACTS

6 This Court appointed the Receiver in response to the unprecedented and ongoing crisis in
7 the California prison health care system. Following his appointment, the Receiver formed the
8 California Prison Healthcare Receivership Corporation, a tax-exempt, non-profit public benefit
9 corporation ("CPR"). CPR is the vehicle through which the Receiver is carrying out certain of
10 his duties, including contracting for pharmacy services to be provided to the prison health care
11 system. Declaration of Jared Goldman ("Goldman Decl.") filed herewith, ¶ 2.

12 On or about March 30, 2006, John Hagar, this Court's appointed Expert, acting on behalf
13 of the Receiver, commissioned an audit of the system's pharmacy operations. Maxor was
14 selected to conduct the audit, based in part on Maxor's extensive experience in delivering
15 pharmacy services in a correctional setting. Because the pharmacy system had been audited on
16 several occasions in recent years, Maxor limited its focus to a sample of six institutions:
17 California Medical Facility, Substance Abuse Treatment Facility and San Quentin, Folsom,
18 Sacramento and Corcoran State Prisons. *See* Exhibit 1 to Goldman Decl., pp. 4, 12; Transcript of
19 Proceedings of July 26, 2006 ("Transcript"), attached to Request for Judicial Notice filed
20 herewith, pp. 6-10.

21 In June 2006, Maxor submitted its audit with detailed findings and a "Road Map" for
22 addressing the significant shortcomings in the system's pharmacy operations over a three-year
23 period. *See generally* Exh. 1 to Goldman Decl. On July 26, 2006, at a hearing in open court, the
24 Receiver presented the Maxor report and expressed his intention to utilize the "Road Map" as the
25 basis for a contract with an outside vendor to revamp, manage and operate the system's
26 pharmacy operations. As the Receiver stated: "I think the roadmap is totally doable. . . . [W]e
27 will be taking immediate action on this report, so that what my intent is to be back before the
28 Court within the next 30 to 60 days with a plan, with a contract." Transcript, p. 43:15-20. The

1 other parties and the Court concurred in the Receiver's approach. For example, counsel for
2 CDCR stated at the hearing:

3 Based upon our understanding that the idea is to contract out [the] pharmacy
4 management system . . . [I]t's our understanding that if we went through those
5 same State old procurement processes that we all know about, that it would take
6 four to seven months, if everything went according to plan, to complete such a
7 project.

8 Recognizing the urgency of the situation . . . the defendants are supportive. And
9 DGS and CDCR are committed to assisting the receiver as much as possible in an
10 expedited award process.

11 *Id.*, p. 54:3-13. At the conclusion of the hearing, this Court urged the Receiver "to proceed with
12 your proposed plan of action and report back to me as necessary." *Id.*, p. 56: 15-16.

13 The Receiver and his staff developed a Request for Proposal ("RFP") that identified the
14 "Road Map" as the scope of work. Goldman Decl., ¶ 4 and Exh. 2 thereto. The Receiver's
15 primary concern was to locate and retain a contractor that not only had sufficient resources to
16 provide the management services, but one with significant experience in managing and
17 delivering pharmacy services in the correctional context. Declaration of Narinda Singh ("Singh
18 Decl.") filed herewith, ¶ 5; Goldman Decl., ¶ 5. Accordingly, the Receiver's staff undertook an
19 investigation to identify potential vendors with correctional experience. That investigation
20 located seven companies to whom the RFP was then sent on or about August 18, 2006; Maxor
21 was one of the recipients. PHSB was not one of the original recipients of the RFP because it did
22 not surface during the investigation as a potential vendor with experience managing and
23 conducting pharmacy operations in a correctional setting. Several other companies, that had little
24 or no corrections experience, requested and received copies of the RFP. Goldman Decl. ¶¶ 5, 6.

25 Responses to the RFP were due on September 18, 2006. The RFP notified recipients that
26 the Receiver, rather than the CDCR, would be the contracting party acting through CPR and that
27 the Receiver reserved the rights to negotiate with any applicant and to award the contract to any
28 applicant or to no one. Exh. 2 to Goldman Decl., p.1; Sections 9 & 10. The RFP also indicated
29 that the Receiver would select one or more respondents to attend an interview. *Id.*, pp. 3, 6. In
30 addition, the RFP stated that recipients could submit questions to which the Receiver – if he
31 deemed it appropriate – would respond in an addendum to the RFP. *Id.*, p. 3. Finally, the RFP

1 invited applicants to suggest modifications to the Road Map if they believed such modifications
2 were necessary. *Id.*, p. 4, § 5(c)(6).

3 In late August 2006, Robert Chan, who has filed a declaration in connection with PHSB's
4 motion, contacted the Receiver to inquire about the RFP. Dr. Chan represented that he was
5 acting on behalf of a Kansas company, ScriptPRO Pharmacy Automation. The Receiver
6 understands that ScriptPRO is a robotics firm and, according to Dr. Chan, the company lacked
7 the expertise to provide the services required by the RFP. Goldman Decl., ¶¶ 8, 9, 11. On or
8 about August 30, Dr. Chan, acting on behalf of ScriptPRO and another company, Health
9 Resource Management, Inc., sent the Receiver a list of inquiries which, with subparts, exceeded
10 130 questions and encompassed more than 3000 data queries. A number of those questions
11 requested the same information for all 33 facilities in the state prison system. *See* Exh. 3 to
12 Goldman Decl. Because CDCR does not have a sufficient data retrieval system, responding to
13 these questions would have required weeks of staff time and resources that were not available.
14 Such a response would have substantially delayed the Receiver's ability to award the contract.
15 The Receiver exercised his discretion not to respond to the questions or to issue an addendum to
16 the RFP. *Id.*, ¶¶ 10-12.

17 Maxor, McKesson Medication Management ("McKesson") and PHSB, in "partnership"
18 with Dr. Chan, submitted responses to the Receiver by the September 18 deadline. This was the
19 first time that the Receiver was aware that Dr. Chan was affiliated with PHSB. *Id.*, ¶ 13.

20 The Receiver decided to interview all three respondents and scheduled the interviews for
21 mid-October 2006. The Receiver selected a panel comprised of three knowledgeable individuals
22 to interview the respondents: Narinder Singh, the Director of Pharmacy for the Santa Clara
23 County Health and Hospital System; Dr. Peter Farber-Szekrenyi, the Director of the CDCR
24 Correctional Health Care Services; and, Jared Goldman, staff attorney for the Receiver who was
25 coordinating the RFP process and who has substantial experience with public sector health care
26 delivery systems. Goldman Decl., ¶¶ 14-17; Singh Decl., ¶¶ 1-3.

27 The panel met for 1-2 hours with each of the respondents. In addition to responding to
28 the panelists' inquiries, the respondents were given the opportunity to present to the panel any

1 additional or further information about their qualifications to take on the project. Following the
2 interviews, each of the panelists submitted their individual recommendations to the Receiver.
3 The panelists unanimously selected Maxor. Goldman Decl., ¶¶ 17-19; Singh Decl., ¶¶ 4, 5, 8.

4 ARGUMENT

5 A. Non-Party PHSB Has Not Requested Leave to Intervene Under FRCP 24 and, 6 Therefore, Has No Standing To Bring This Motion.

7 PHSB's motion must be denied because PHSB has neither requested nor been granted
8 leave to intervene pursuant to FRCP 24. Instead, apparently hoping to bootstrap itself into the
9 status of party to the action, PHSB simply asserts that it is a "Real Party In Interest/Third Party
10 Intervenor." Not so fast.

11 Rule 24(c) of the Federal Rules of Civil Procedure provides that a non-party wishing to
12 participate in an action "shall" file a motion for leave to intervene. The movant must
13 demonstrate either that it is an intervenor as of right pursuant to FRCP 24(a) or that it should be
14 permitted to intervene pursuant to FRCP 24(b). PHSB has not complied, or even attempted to
15 comply, with Rule 24 and its failure to do so is fatal to this motion.

16 The Ninth Circuit's decision in *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326
17 (9th Cir. 1977) is dispositive. In that case, the district court permitted a number of parents, who
18 had not sought leave to intervene, to participate in a school desegregation case and then granted
19 the relief the parents requested. The Ninth Circuit reversed, emphasizing that non-parties, such
20 as the appellants in that case, must comply with Rule 24. If intervention is "granted, there should
21 be a determination on the record that the motion has been granted either as a matter of right,
22 Fed.R.Civ.P. 24(a), or by permission of the court, Fed.R.Civ.P. 24(b)." *Id.* at 1329. The court
23 went further and held that it was error for the district court to have even considered the parents'
24 request for substantive relief in the absence of a prior motion to intervene. The parents

25 were required to file a motion to intervene pursuant to Fed.R.Civ.P 24(c). They
26 did not do so. The lower court made no determination of their status as
27 intervenors. If a court has for some reason permitted persons who are not parties
28 to a suit to participate in some stage of the proceedings, this will *rarely, if ever,*
suffice to eliminate the necessity of formal intervention to become parties in their
own right. Thus, it was error for the court to conduct proceedings at the moving
parents' request and to grant relief in their favor.

1 *Id.* (Emphasis added.)

2 The Receiver does not intend to shadow box with a motion for leave to intervene that
3 PHSB should have, but has not, brought.¹ But surely it is no accident that PHSB has not
4 requested leave since it is highly doubtful that PHSB can, or could ever, meet the requirements of
5 Rule 24. Those requirements exist for a reason: to permit the court to balance the complexities
6 and demands of the case before it with the interests of non-parties who have a legitimate stake in
7 the outcome of the litigation. *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994).
8 Thus, a party seeking intervention must claim a “significant protectable interest relating to the
9 property or transaction that is the subject of the action.” *U.S. v. Alisal Water Corp.*, 370 F.3d
10 915, 919 (9th Cir. 2004). A significant protectable interest exists if a) the interest is protected by
11 law, and b) there is a relationship between the legally protectable interest and the underlying
12 claim. *Id.* A mere interest in property that may be affected by the litigation is an insufficient
13 basis upon which intervention may be granted. *Id.* An intervenor’s interest cannot be several
14 degrees removed from the underlying concerns of the action. *Id.* Instead, an “intervening party
15 may join issue only on a matter that has been brought before the court by another party.” *Edison*
16 *Elec. Institute v. EPA*, 391 F.3d 1267, 1274 (D.C.Cir. 2004).

17 Even cursory consideration of the facts demonstrates that PHSB has no protectable
18 interest in this litigation nor has it identified one. And, in any event, any such interest is
19 tangential to the overriding prison healthcare issues that prompted both this lawsuit and the
20 appointment of the Receiver. By failing to seek leave to intervene, therefore, PHSB has
21 attempted a shortcut to party status that the law does not permit and the facts do not justify.

22 Seeking to avoid the strictures of Rule 24, PHSB attempts to rely upon *SEC v. Lincoln*
23 *Thrift Ass’n*, 577 F.2d 600 (9th Cir. 1978). That decision is of no assistance to PHSB. *Lincoln*
24 *Thrift* involved an appeal by creditors of a failed savings association that had been placed in
25 receivership. The receiver decided to liquidate the association and gave notice to all creditors to
26 assert their claims in the receivership proceeding. Creditors who responded, including the

27 _____
28 ¹ If PHSB is convinced that it has some legitimate interest to protect, it can file a motion to intervene and the Receiver will be able to respond to PHSB’s arguments for intervention on the merits.

1 appellants, were permitted to participate in the hearing. Appellants appeared and requested that
2 the case be transferred to the bankruptcy court or that a creditors' committee be formed in the
3 receivership proceeding. The district court denied the relief appellants requested and the
4 liquidation proceeded. By the time of the appeal, "the liquidation proceedings were in an
5 advanced stage." *Id.* at 609.

6 On appeal, the Ninth Circuit addressed appellants' standing *sua sponte*. After noting the
7 continued vitality of *Spangler, supra* (*id.* at 602 n.2), and that appellants "more properly might
8 have moved to intervene" under Rule 24 (*id.* at 603), the court permitted the appeal "in order that
9 we can with finality adjudicate the authority of the receiver to act under the supervision of the
10 district court." *Id.* The Ninth Circuit then affirmed.

11 It is apparent that the court's decision to confer standing on the appellants in *Lincoln*
12 *Thrift* was essentially prudential. The receiver in that case had invited the appellants to
13 participate in the proceedings below, the district court had permitted them to participate without
14 objection by any party, the appellants had a recognized interest in the proceedings and the
15 liquidation had nearly concluded by the time of the appeal. No purpose would have been served
16 in *Lincoln Thrift* by denying the appellants standing to appeal in a case that was effectively over,
17 particularly when the Ninth Circuit had decided to affirm on the merits in any event.

18 The status of the appellants in *Lincoln Thrift* is a far cry from PHSB's circumstances in
19 this case. PHSB has not been invited to participate by the Receiver or the Court and has no
20 significant protectable interest that will even arguably be affected by a resolution of the litigation.
21 If every disgruntled potential vendor could simply show up in this Court to complain about the
22 Receiver's decision making, without first seeking leave to intervene, the Receiver and this Court
23 could become hopelessly bogged down and distracted from the real issues at hand: addressing the
24 healthcare crisis in the state prison system. The motion should be denied.

25 **B. PHSB's Motion Should Be Denied On The Merits.**

26 **1. The Receiver is not subject to the public contracting requirements of State**
27 **law.**

28 PHSB's motion proceeds from the faulty premise that the Receiver must comply with

1 notice and competitive bidding requirements applicable to State agencies contracting for
2 construction, goods and/or services. The easy answer to PHSB's arguments, therefore, is that the
3 Receiver is not subject to those requirements.²

4 Following his appointment the Receiver formed CPR to provide a vehicle through which
5 he could carry out a number of his duties, including contracting for services to be provided to the
6 prison healthcare system. It goes without saying that CPR is not a State agency; it is not even a
7 public entity. As such, it is not bound to the contracting requirements applicable to public
8 entities in California.

9 For example, a "contract" that must be posted in the State Contracts Register means "an
10 agreement entered into by a *state agency* for services" Cal. Gov't Code § 14825 (emphasis
11 added). *See also* Cal. Gov't Code § 14827.1 ("No *state agency* shall award a contract unless
12 notice thereof has first been published in the California State Contracts Register."). By the same
13 token, only public entities are subject to the *Public Contracts Code*. *See, e.g.*, Cal. Pub.
14 Contracts Code § 1100 (defining "public entity" subject to Public Contracts Code); Cal. Pub.
15 Contracts Code §§ 6100, 6101 (imposing certain constraints on a "state agency or department"
16 before contracts may be awarded); Cal. Pub. Contracts Code § 10100 et seq. (Entitled "State
17 Contract Act"); Cal. Pub. Contracts Code § 10290 et seq. (Entitled "State Acquisition of Goods
18 and Services"). *Cf. Service Employees' Internat. Union, Local No. 22 v. Roseville Community*
19 *Hosp.*, 24 Cal.App.3d 400, 407-408 (1972) (community hospital organized as a private nonprofit
20 corporation is not a "public agency" having "public employees" for purpose of collective
21 bargaining); 81 Ops.Cal.Atty.Gen. 213, 215 (1998) (nonprofit public benefit corporation is not a
22 "public corporation" or "public agency" for purposes of forming a joint powers agency).

23 It should have come as no surprise to PHSB that the Receiver was not governed by State
24 contracting procedures, that he intended to award the contract through CPR and that he retained
25 the sole discretion to award the contract to anyone he believed appropriate or to no one at all.

26 ² It is rather surprising that PHSB has asserted in its motion that the Receiver is somehow subject to State contracting
27 procedures. On October 5, 2006, even before PHSB was interviewed in connection with its bid and roughly seven
28 weeks before PHSB filed its motion, the Receiver wrote PHSB to explain that neither the RFP nor the procedure
adopted by the Receiver was subject to the Public Contracts Code. *See* October 5, 2006 letter from Robert Sillen to
Eric Flowers, a copy of which was sent to this Court.

1 The very first paragraph of the RFP states: "The awarded contract will be a service agreement
2 with the Receiver through the California Prison Health Care Receivership Corporation (CPR)."
3 Exh. 2 to Goldman Decl., p.1. Section 9, entitled "Reservation of Rights," provides that CPR, in
4 its discretion, could "[a]ward a contract to any applicant." *Id.*, p. 5, § 9(i). And Section 10,
5 entitled "RFP Evaluation and Contract Award," states that the "Receiver, in his sole discretion,
6 will select the candidate with whom CPR will begin negotiations for a contract." *Id.*, p. 6.

7 Subject to this Court's oversight, the Receiver, acting through CPR, was free to enter into
8 a contract without an RFP, just as he was free to structure the RFP in the manner he believed
9 most appropriate under the circumstances.

10 **2. Subjecting the Receiver to State procurement procedures would result in**
11 **substantial delay and is unnecessary since adequate safeguards exist to**
12 **ensure that the receivership is conducted appropriately.**

13 PHSB's self-interested motion purports to expose a problem that does not exist, *i.e.*,
14 alleged favoritism by the Receiver in the awarding of the pharmacy contract. And the solution
15 that PHSB proposes, *i.e.*, forcing the Receiver to comply with State contracting procedures,
16 guarantees nothing except a further deepening of the crisis in the prison healthcare system. For
17 there can be no dispute that one of the drivers in the State's inability to address that crisis has
18 been the overly bureaucratic and sclerotic nature of the State's contracting and budgeting
19 process. (*See* "Findings Of Fact And Conclusions Of Law Re Appointment Of Receiver," filed
20 herein on or about October 3, 2005, ¶¶ 77-79.) Thus, this Court has encouraged the Receiver to
21 take quick action because lives are literally being lost as a result of delays in remedying the
22 system. To that end, the Court even built into the receivership order a mechanism by which the
23 Receiver may request disregarding State law and procedures as, and to the extent, necessary to
24 complete his work. (*See* Order, dated February 14, 2006, ¶ II.D.) Such a request was
25 unnecessary here because, as discussed above, the Receiver is not subject to the State contracting
26 procedures when doing business through CPR.

26 In any event, cognizant of the need to move quickly, at the hearing on July 26, 2006, the
27 Receiver indicated that he intended to utilize the "Road Map" as the scope of work for the RFP
28 and intended to have a contract in hand within "30 to 60 days" thereafter. Transcript, p. 43:15-

20. Counsel for the defendants concurred, acknowledging that the State procurement processes would take at least “four to seven months” to complete.³ As a result, “[r]ecognizing the urgency of the situation,” the State was committed to working with the Receiver in “an expedited award process.” *Id.*, p. 54:6-13. This Court likewise agreed with the Receiver’s approach, stating that, “It’s time for action. . . . I urge you to proceed with your proposed plan of action and report back to me as necessary.” *Id.*, 56:13-16. Subjecting the Receiver to the constraints inherent in the State procurement process would be contrary to the need to proceed expeditiously that all parties and this Court recognize is required.

Nor would any particular purpose be served by forcing the Receiver to comply with procedures that otherwise do not apply to him. The State contracting procedures are designed to ensure fairness to participants, to avoid secret deals and to guarantee openness in the process of awarding public contracts – all laudable goals to be sure. But imposing state contracting procedures on the Receiver is unnecessary because other adequate safeguards exist to guarantee that the receivership is being conducted appropriately. To begin with, the receivership exists within the very public arena surrounding the crisis in the prison healthcare system. The Receiver is subject to the scrutiny of the press, the public, State government, and most importantly, this Court. The Receiver serves at the pleasure of this Court, must report regularly to the Court and can be dismissed if, at any point, this Court believes he has failed to carry out his duties appropriately. It need hardly be said, therefore, that the Receiver has distinct reasons to operate the receivership reasonably, in good faith and with adequate transparency for all concerned.⁴ There is no need to impose upon the Receiver additional requirements that will only hinder his efforts promptly to address the failings in the prison healthcare system.

³ In fact, evidence before this Court indicates that the process can take as much as two years. Findings of Fact and Conclusions of Law, ¶ 77.

⁴ And if Court oversight is not enough, there are the substantial regulatory constraints imposed on tax exempt, non-profit corporations such as CPR. Federal tax law contains distinct prohibitions on, and severe sanctions for, transactions resulting in unlawful “private benefit.” Non-profit corporations, and the individuals managing them, that run afoul of these rules can be penalized by the imposition of excise taxes or even revocation of tax exempt status. *E.g.*, 26 U.S.C. §§ 501(c)(3), 4958. In addition, under state law a non-profit corporation can be dissolved on application of the California Attorney General if the corporation has failed to carry out its purposes or its management has countenanced “persistent and pervasive” fraud, mismanagement or abuse of authority. Cal. Corp. Code § 6510; *see also* 2 CEB, *Advising California Nonprofit Corporations*, §14A.8, p. 838.

1 **3. The RFP procedure devised by the Receiver was fair and reasonable and**
2 **PHSB lacked the qualifications to be awarded the contract.**

3 In undertaking the RFP, the Receiver's primary goal was to find a vendor that had
4 significant experience managing and providing pharmacy services in the correctional context.
5 Singh Decl., ¶5. To that end, the Receiver's staff conducted a search to locate potential vendors
6 with the appropriate correctional experience. In the course of that investigation, the Receiver's
7 staff identified seven companies to whom the staff sent the RFP; Maxor was one of those
8 vendors. A number of other potential applicants contacted the Receiver and were provided a
9 copy of the RFP upon request. Goldman Decl., ¶ 5.

10 One of the potential applicants who contacted the Receiver was Dr. Chan, who
11 represented that he was acting on behalf of ScriptPRO Pharmacy Automation, a robotics firm.
12 Although he acknowledged during a conversation with the Receiver's staff that he and his
13 company did not have the expertise required to perform the contract, he requested and received a
14 copy of the RFP. *Id.*, ¶¶ 8, 9.

15 The applicants had as much as 30 days within which to submit bids, and by the
16 September 18 deadline for responses, the Receiver had received bids from Maxor, McKesson and
17 PHSB, in "partnership" with Chan. The Receiver decided to interview all three respondents and
18 scheduled the interviews for October, 2006. Practically speaking, therefore, the respondents had
19 additional time to prepare information responsive to the RFP. *Id.*, ¶ 13.

20 To conduct the interviews, the Receiver selected a panel comprised of: Nari Singh, the
21 Director of Pharmacy for the Santa Clara County Health and Hospital System; Dr. Peter Farber-
22 Szekrenyi, the Director of the CDCR Correctional Health Care Services; and, Jared Goldman,
23 staff attorney for the Receiver who was coordinating the RFP process. The panel met for 1-2
24 hours with each of the respondents. The interviews consisted of a presentation by each of the
25 applicants, followed by questions and answers. Goldman Decl., ¶¶ 14-17; Singh Decl., ¶ 4.

26 In the opinion of the panelists, PHSB's submission failed to establish that it had the
27 qualification to perform the contracts. PHSB did not demonstrate sufficient understanding of the
28 issues nor did it appear to have a strategy for addressing the failures in the system. Singh Decl.,

1 ¶ 3. For example, PHSB was asked what tasks it would undertake in the first weeks of the
2 contract. According to Mr. Singh, “PHSB seemed not to have considered this issue in advance,
3 and the answers its representatives gave left me with the distinct impression that they were
4 responding ‘on the fly.’” *Id.*, ¶ 4. In the course of the interviews, the panelists asked the
5 applicants whether they would alter or modify the Road Map in any fashion and, if so, how and
6 why. Both Maxor and McKesson suggested modifications to the Road Map and gave
7 explanations; PHSB did not. *Id.*, ¶ 6. The focus of PHSB’s response to the RFP was on
8 application of technology, without sufficient consideration given to the underlying systemic and
9 managerial shortcomings of the prison pharmacy operations. As Mr. Singh said, “[T]echnology
10 cannot substitute for process.” *Id.*, ¶ 5. And, most important, PHSB lacked any relevant
11 experience managing pharmacy operations in a corrections context. *Id.*, ¶¶ 4, 5.

12 Following the interviews, each of the panelists made an individual recommendation to the
13 Receiver as to the respondent they believed best met the qualifications needed to carry out the
14 Road Map. The panelists unanimously recommended that the Receiver award the contract to
15 Maxor and he did so. Goldman Decl., ¶¶ 18, 19; Singh Decl., ¶ 5. The process utilized by the
16 Receiver provided the bidders sufficient opportunity to present their qualifications. PHSB did
17 not satisfy the panelists that it could perform the contract and, therefore, its application fell short.
18 That – not some backroom deal – was why it was not awarded the contract.

19 **4. PHSB’s charge that the RFP assured Maxor would be awarded the contract**
20 **is without basis in fact.**

21 The crux of PHSB’s argument is that the RFP somehow guaranteed that Maxor would be
22 awarded the contract. Since, subject to this Court’s oversight, the Receiver had the right and
23 ability to award the contract to anyone that he believed appropriate, this argument amounts to
24 much sound and fury, signifying nothing. But even taken at face value, the argument fails.⁵

25 _____
26 ⁵ It should be noted that PHSB’s claims are not directed only at the Receiver. Given the concurrence of the parties
27 and the Court at the July 26 hearing that the Road Map developed by Maxor was the appropriate plan to follow and
28 that quick action was necessary, PHSB is effectively accusing the plaintiffs, the defendants and this Court of
collusion and bad faith. Indeed, one of the panelists took umbrage at PHSB’s claim. As Mr. Singh stated: “I
understand that PHSB has alleged that the RFP was designed to assure that Maxor was awarded the contract. This
was certainly not my impression nor would I have participated in a sham selection process.” ¶ 6.

1 PHSB's claim that this was all a set up purports to rest on three contentions: (1) that the
2 Receiver declined to answer PHSB's questions; (2) that bidders, other than Maxor, "were forced
3 to accept Maxor's statements . . . in its audit as accurate, rather than allowing their experts the
4 opportunity to clarify, refine or qualify issues related to" the pharmacy operations; and, (3) that
5 the Road Map calls for a "central fill" pharmacy, Maxor already operates a "central fill" facility
6 and "[m]any in the pharmaceutical industry believe that a 'central fill' system is not in the
7 patients' best interest" PHSB Motion, pp. 7-8. Each of these contentions is without merit.

8 First, PHSB did not send the Receiver any questions. *Dr. Chan* – acting on behalf of
9 ScriptPRO and another company, Health Management Resources, Inc. – sent an overwhelming
10 list of questions to the Receiver. Each of the individual categories of questions contained
11 multiple subparts, and in many cases the subparts contained subparts. A number of the questions
12 sought information for all 33 facilities in the state prison system. The Receiver's staff estimated
13 that the questions encompassed over 3000 separate data queries. Exh. 3 to Goldman Decl.⁶
14 CDCR lacks a data retrieval system that would have permitted a response to the queries. Thus,
15 any such response would have required manual retrieval of the data. Responding to these
16 burdensome requests would have required weeks of staff time and resources that were not
17 available and would have substantially delayed the Receiver's ability to award the contract.
18 Particularly since this extraordinarily burdensome set of questions had been submitted by a
19 company without apparent relevant experience, the Receiver exercised his discretion not to
20 respond. Goldman Decl., ¶¶ 10, 11.

21 Second, the whole point of the RFP was to implement the Road Map, a decision in which
22 this Court and the parties concurred at the July 26 hearing. A response to Dr. Chan's several
23 thousand data queries would have amounted to yet another audit of the pharmacy system. *Id.*
24 Studies and data collection concerning the system had been done; it was time to move toward
25 implementation. As this Court stated at the July 26 hearing:

26 I agree with you Mr. Sillen, that this problem has been studied enough. It's time
27 for action, and action – you will take. . . . I urge you to proceed with your
proposed plans of action and report back to me as necessary.

28 ⁶ PHSB's description of these inquiries as "five detailed questions" is thus highly misleading.

1 Transcript, p. 56:12-16.

2 Nevertheless, the Receiver was not inexorably wedded to the Road Map. In the RFP
3 itself, and again at the interviews, applicants were permitted to suggest modifications to the Road
4 Map if they believed such modifications were necessary. Exh. 2 to Goldman Decl., p. 4, § 5c.(h).
5 Maxor and McKesson took advantage of that opportunity to suggest different or additional
6 procedures in the completion of the contract; PHSB did not. Singh Decl., ¶ 6.

7 Third, and finally, a "central fill" pharmacy is an accepted, even preferred, methodology
8 in large pharmacy operations. As Nari Singh, a member of the interview panel, states in his
9 declaration:

10 I fundamentally disagree that a central fill pharmacy is unusual or detrimental to
11 good operations of a pharmacy system. In fact, a central fill approach can result in
12 increased efficiencies and cost savings. For example, the Santa Clara County
13 Health and Hospital System uses a central fill pharmacy and we have been
14 satisfied with the results. Central fill takes pressure off the local pharmacies,
15 particularly when it comes to re-fills and other non-urgent needs. Those non-
16 urgent needs can be handled by the central fill, permitting the local pharmacies to
17 address more urgent and immediate prescription fill demands. This tends to
18 eliminate backlogs in the system and permits the frontline pharmacy staff the
19 ability to meet the most pressing needs in a timely fashion.

20 I am satisfied that the recommendation that Maxor be awarded the contract, and
21 rejecting PHSB's bid, was the correct decision.

22 Singh Decl., ¶¶ 7, 8.

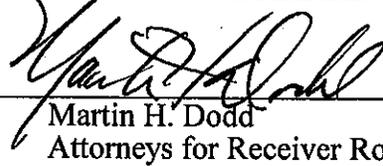
23 Put simply, there is no factual basis for PHSB's charges and they should be disregarded.

24 **CONCLUSION**

25 For all the foregoing reasons, the motion of non-party PHSB to set aside the contract
26 awarded to Maxor should be denied.

27 Dated: December 29, 2006

FUTTERMAN & DUPREE LLP

28 By: 

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